United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE ROBB.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2186. 749

No. 7, SPECIAL CALENDAR.

UNITED STATES OF AMERICA *EX REL.* CHARLES DE LOS RICE, APPELLANT,

vs.

EDWARD B. MOORE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JUNE 28, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2186.

No. 7, SPECIAL CALENDAR.

UNITED STATES OF AMERICA *EX REL.* CHARLES DE LOS RICE, APPELLANT,

vs.

EDWARD B. MOORE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 11, 1910.

In the Court of Appeals of the District of Columbia.

No. 2186.

UNITED STATES OF AMERICA ex Rel. CHARLES DE LOS RICE,
Appellant,
vs.
EDWARD B. MOORE.

---

a Supreme Court of the District of Columbia.

52322. At Law.

UNITED STATES OF AMERICA *ex Rel.* CHARLES DE LOS RICE,
Relator,
vs.
EDWARD B. MOORE, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition as Amended.*

Filed January 24, 1910.

In the Supreme Court for the District of Columbia.

52322.

UNITED STATES OF AMERICA, *ex Rel.* CHARLES DE LOS RICE,
Relator,
vs.
EDWARD B. MOORE, Respondent.

To the Honorable The Justice of the Supreme Court of the District of Columbia:

1. The above named relator respectfully shows to the Court that he is a citizen of the United States residing in the City and County

of Hartford and State of Connecticut; that the respondent, Edward B. Moore, is the Commissioner of Patents, duly qualified and acting as such, and that said respondent was such Commissioner and acting as such at the time of the occurrence between the parties hereinafter mentioned.

2. Your relator further shows that heretofore, to wit: on the 2nd day of March 1906, in the manner prescribed by law, your petitioner filed an application for patent for Belt Gearing; that on the 22nd day day of September 1905 one Harding Allen of Barre, in the County of Worcester, State of Massachusetts, filed an application for a patent for a Drill Press, S. No. 279,641.

2 3. That thereafter an interference proceeding was instituted and declared on the 26th day of May 1908, between said application of said Allen S. No. 279,641, and the said application of your petitioner, said interference being numbered 28,971.

4. That thereafter, in accordance with the Rules of Practice of the Patent Office, your petitioner filed a preliminary statement; that said Allen did not file a preliminary statement; that thereafter notice was issued by the Patent Office setting times for taking testimony and for the final hearing and that pursuant to said notice your petitioner took testimony in support of his case and that said Allen took no testimony.

5. That thereafter, on the 8th day of September 1909, a final hearing was had before the Examiner in Charge of Interferences and that on the 10th day of November 1909 the Examiner in Charge of Interferences rendered a decision in the case awarding priority of invention to said Allen and fixing limit of appeal to expire November 30th, 1909.

6. Your petitioner further shows unto Your Honors that Section 4909 of the United States Compiled Statutes 1901 reads as follows:

"Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner or of the examiner in charge of interferences in such case, to the board of examiners-in-chief; having once paid the fee for such appeal."

That Section 4934 of the United States Compiled Statutes 1901 reads in part as follows:

"The following shall be the rates for patent fees:

* * * * * * *

3 On an appeal for the first time from the primary examiner to the examiners-in-chief ten dollars.

On every appeal from the examiners-in-chief to the Commissioner, twenty dollars.

* * * * * * *

That Rule 146 of the Rules of Practice of the United States Patent Office reads as follows:

"146. In interference cases parties have the same remedy by appeal to the examiners-in-chief, to the Commissioner and to the Court of Appeals of the District of Columbia as in ex parte cases."

That Rule 203 of the Rules of Practice of the United States Patent Office reads in part as follows:

"203. The following is the schedule of fees and the prices of publications of the Patent Office:

* * * * * * *

On an appeal for the first time from the primary examiner to the examiners-in-chief $10.00
On every appeal from the examiners-in-chief to the Commissioner $20.00

* * * * * * *"

That Section 440 of the United States Compiled Statutes 1901 reads in part as follows:

"There shall also be in the Department of the Interior:

* * * * * * *

In the Patent Office:

One examiner in charge of interferences * * *.

* * * * * * *

Twenty-four principal examiners * * *.

* * * * * * *"

7. That on November 30th, 1909, your petitioner filed an appeal in the United States Patent Office from the decision of the Examiner in Charge of Interferences in form as provided for in the Statutes of the United States and the Rules of Practice of the United States Patent Office, which appeal was received at the United States Patent Office within the time limit of appeal fixed by the Examiner in Charge of Interferences; as will more fully appear from certi-
4 fied copy of said appeal attached hereto and marked "Exhibit A."

8. That thereafter, on the 3rd day of December 1909, your petitioner was advised by his associate in Washington that said associate had been informed by an official of the docket room of the United States Patent Office that the appeal filed by your petitioner was incomplete in that it was not accompanied by an appeal fee, and in consequence that the appeal would not be allowed; which action was contrary to the United States Statutes relating to appeals as set forth above.

9. That for the purpose of complying with the requirements of the Honorable Commissioner of Patents, on the 3rd day of December 1909 your petitioner telegraphed his associate to pay an appeal fee and prepare necessary papers to have the appeal reinstated. That on December 3rd, 1909, an appeal fee of ten dollars was paid into the United States Patent Office. That on December 4th, 1909, your petitioner filed a motion before the Honorable Commissioner of Patents accompanied by notice served on counsel for Allen and by affidavits of T. K. Bryant and H. E. Hart; that on the 9th day of December 1909, said motion was heard before the First Assistant Commissioner of Patents and by him denied on the 10th day of December 1909; as will more fully appear from the certified copies attached hereto and made part hereto and marked "Exhibit B, Peti-

tioner's First Motion Papers and Decision of Assistant Commissioner of Patents."

That thereafter, on December 17th, 1909, your petitioner made a motion before the Honorable Commissioner of Patents in per-
5 son, said motion being accompanied by a notice served on attorneys for Allen and by an affidavit of H. E. Hart, and that said motion was heard by the Honorable Commissioner of Patents in person on the 23rd day of December 1909, and by him denied on the 3rd day of January 1910; all of which will more fully appear from the certified copies attached hereto and made a part hereof and marked "Exhibit C, Petitioner's Second Set of Motion Papers and Decision of Commissioner of Patents."

10. That your petitioner was entitled as a matter of right under the Statutes and Rules of Practice in the Patent Office in such cases made and provided, and particularly under Section 4909, to an appeal from the decision of the Examiner in Charge of Interferences to the Board of Examiners-in-Chief.

11. That your petitioner was entitled as a matter of right and as a matter of law to have the appeal filed by him within the limit of appeal set by the Examiner in Charge of Interferences allowed and docketed.

12. That the Commissioner of Patents by his refusal to allow said appeal and have it docketed acted without authority of law.

14. That by such acts of the said Edward B. Moore, Commissioner of Patents, your petitioner was and is deprived of a legal right vested in him by the laws of the United States relating to the granting of letters patent for inventions and is entirely without redress or remedy unless this Honorable Court shall interpose in his behalf by writ of mandamus as prayed for below.

Whereupon your petitioner prays:

6 That a writ of mandamus may be issued by this Honorable Court to the said Edward B. Moore, Commissioner of Patents, commanding him to accept the appeal filed by your petitioner in accordance with law and direct the Board of Examiners-in-Chief to hear said appeal.

And as in duty bound your petitioner will ever pray.

CHARLES DE LOS RICE.

MILTON STRASBURGER,
H. E. HART,
Counsel for Petitioner.

STATE OF CONNECTICUT,
County of Hartford, ss:

Charles De Los Rice, being duly sworn, deposes and says that he has read the foregoing petition, by him signed, and understood the contents thereof; that the statements therein contained are true to his own knowledge and belief except as to those matters therein stated to be on information and belief and as to such matters he verily believes them to be true.

CHARLES DE LOS RICE.

Subscribed and sworn to by the said Charles De Los Rice, before me, this 17th day of January, 1910.

D. I. KREIMENDAHL,
[SEAL.] *Notary Public.*

7 STATE OF CONNECTICUT,
County of Hartford, ss:

H. E. Hart, being duly sworn, says that he is attorney and counsel for Charles De Los Rice, the petitioner above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the United States Patent Office; that he has read the said petition by him attested and that the facts stated therein are true to the best of his knowledge and belief.

H. E. HART.

Subscribed and sworn to by the said H. E. Hart, before me, this 17th day of January 1910.

D. I. KREIMENDAHL,
[SEAL.] *Notary Public.*

8 PLAINTIFF'S EXHIBIT "No. 1-A."

Filed January 24, 1910.

United States of America,

Department of the Interior,

United States Patent Office.

To all to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the Record of this Office of Paper Number 41, Appeal to Examiners-in-Chief, filed December 3, 1909, in the matter of Interference Number 28,971, Rice vs. Allen. Subject-Matter: Belt Gearing.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 20th day of January, in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States of America the one hundred and thirty-fourth.

[SEAL.] F. A. TENNANT,
Assistant Commissioner of Patents.

9 All communications should be addressed to The Commissioner of Patents, Washington, D. C."

$10 Received, Dec. 3, 1909. D. Chief Clerk, U. S. Patent Office.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C.

The Commissioner of Patents.

SIR: Please file enclosed Appeal fee of $10.00 with the Notice of

Appeal filed herein on Nov. 30th, 1909, In re Charles De Los Rice vs. Harding Allen, Interference #28971.

HARRIE E. HART,
By H. C. EVERT & CO., *City*.

(Give Full Address.)

Cost $——.
Received $——.
Delivered ——, 190—.

10 Mail Room,
Nov. 30, 1909,
U. S. Patent Office.

Intf. No. 28,971, Paper No. 41.

3

In the United States Patent Office.

In Interference.

No. 28,971.

CHARLES DE LOS RICE
vs.
HARDING ALLEN.

Subject-matter, Belt Gearing.

To the Commissioner of Patents:

I hereby appeal to the Examiners-in-Chief from the decision of the Examiner of Interferences in the matter of the interference between my application for letters patent for improvement in Belt Gearing, S. No. 303,907, and the application of Harding Allen, S. No. 279,641, in which priority of invention was awarded to said Allen. The following are assigned as reasons of appeal:

1. That the Examiner of Interferences erred in awarding priority of invention to Allen.

2. That the Examiner of Interferences erred in not awarding priority of invention to Rice.

3. That the Examiner of Interferences erred in not holding that the Rice machine of April 1904 was a full sized operative machine embodying the issues of this interference which was successfully operated in April 1904 and has been in continuous use since that time.

4. That the Examiner of Interferences erred in holding
11 that certain testimony on behalf of Rice was "inadmissable under his preliminary statement."

5. That the Examiner of Interferences erred in holding that testimony offered on behalf of Rice failed to establish that his April 1904 machine or any machine built by him prior to the filing date of Allen constituted a reduction to practice of the issue.

6. That the Examiner of Interferences erred in not considering in connection with the present interference the testimony taken in the companion interference No. 28,720 between the same parties.

Signed at Hartford, in the County of Hartford and State of Connecticut, this 29th day of November 1909.

CHARLES DE LOS RICE,
By H. E. HART, *His Attorney.*

12 PLAINTIFF'S EXHIBIT "No. 2-B."

Filed January 24, 1910.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the Records of this Office of Paper Number 42, motion by Rice, filed December 7, 1909, Paper Number 43, Notice of Hearing, dated December 7, 1909, Paper Number 44, Decision of Commissioner, dated December 10, 1909, and Paper Number 45, Notice of Decision, dated December 11, 1909, in the matter of Interference Number 28,971, Rice vs. Allen, Subject-Matter:—Belt Gearing.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 20th day of January, in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States of America the one hundred and thirty-fourth.

[SEAL.] F. A. TENNANT,
Assistant Commissioner of Patents.

13 Docket Clerk,
Dec. 7, 1909,
U. S. Patent Office.

Intf. No. 28,971, Paper No. 42.

In the United States Patent Office.

Before the Honorable Commissioner of Patents.

Interference #28,971.

HARDING ALLEN
vs.
CHARLES DE LOSS RICE.

Notice.

To Southgate & Southgate, Attorneys for Allen, Worcester, Mass.:

Please take notice that on Thursday, December 9, 1909, at 10 o'clock in the forenoon or at such other date as will suit the con-

venience of the Honorable Commissioner, the annexed Motion will be presented before the Honorable Commissioner of Patents on behalf of Charles De Loss Rice.

H. E. HART,
Attorney for Rice.
H. C. EVERT & CO.,
Associate Attorneys for Rice.

Washington, D. C., December 4, 1909.

14 Docket Clerk,
Dec. 7, 1909,
U. S. Patent Office.

In the United States Patent Office.

Before the Honorable Commissioner of Patents.

Interference #28,971.

HARDING ALLEN

—

CHARLES DE LOSS RICE.

Motion.

Hon. Commissioner of Patents.

SIR: Now comes Charles De Loss Rice, a party in the above entitled proceeding, and moves that his Notice of Appeal herein filed November 30, 1909, and appeal fee filed on December 3, 1909, be both considered as a perfecting of the appeal on behalf of Rice and be given full force and effect under the rules; or in the discretion of the Honorable Commissioner, that the limit of appeal expiring on November 30, 1909, be extended to include December 3, 1909, the date upon which payment was made and such other and further relief as may seem just and equitable. The annexed affidavits and the file records will be relied upon in support of this Motion.

CHARLES DE LOSS RICE,
By H. E. HART,
Attorney of Record.
H. C. EVERT & CO.,
Associate Attorneys.

Washington, D. C., December 4, 1909.

15 Docket Clerk,
Dec. 7, 1909,
U. S. Patent Office.

In the United States Patent Office.

Before the Honorable Commissioner of Patents.

Interference #28,971.

HARDING ALLEN
vs.
CHARLES DE LOSS RICE.

Affidavit.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Theodore K. Bryant being duly sworn, deposes and says that he is of lawful age and an employee of H. C. Evert & Co., 308 Ouray Building, Washington, D. C., who are associate attorneys for Harrie E. Hart, the attorney of record for Charles De Loss Rice in the within proceeding.

That it appears from the files in this case, that a decision to priority was made by the Examiner of Interferences on or about November 10, 1909, and that the limit of appeal was set to expire November 30, 1909.

On December 2, 1909, the attention of deponent was orally called to certain facts by officials of the Patent Office, which facts consisted of the receipt by the Mailing Division of the Patent Office of a Notice of Appeal from Harrie E. Hart as attorney for said
16 Rice herein. This Notice of Appeal was inspected by deponent upon said date and he was informed that no appeal fee had been received from Mr. Hart and that the appeal was therefore not perfected. Deponent immediately communicated with said attorney of record and upon December 3rd received a telegram requesting that the appeal fee be paid immediately on behalf of Rice and that necessary papers to re-instate the appeal be prepared and in response thereto the said appeal fee amounting to $10.00 was duly deposited with the Financial Clerk on the said 3rd day of December, 1909.

That as it was a late hour in the afternoon of December 2nd when the error in omitting to file an appeal fee was called to deponent's attention, the communicating with attorney of record Hart resulting in the filing of the appeal fee on the next day, December 3rd, was a matter of the greatest possible diligence.

It appears to the best of deponent's knowledge that no communication with the attorney of record or his associates had been attempted on the part of the Patent Office up to December 2nd at the time on which this deponent was advised in the matter.

That it appears from a letter this day received from attorney of

record Hart that the omission to file the appeal fee with the Notice of Appeal herein was a matter of inadvertence and mistake and upon receipt of said letter, the preparation of the present motion papers was immediately taken up.

And further affiant sayeth not.

THEODORE K. BRYANT.

17 Sworn to and subscribed before me this 4th day of December, 1909.

GEO. B. PITTS,
Notary Public, D. C.

[NOTARIAL SEAL.]

In the United States Patent Office.

Before the Honorable Commissioner of Patents.

Interference No. 28,971.

HARDING ALLEN
vs.
CHARLES DE LOS RICE.

Affidavit.

STATE OF CONNECTICUT,
County of Hartford, ss:

H. E. Hart, being duly sworn deposes and says that he is counsel for Rice in the matter of the above entitled interference.

That on or about November 10, 1909, the Honorable Examiner of Interferences rendered a decision in the above entitled case awarding priority of invention to Allen; which said decision was received by deponent on or about November 12, 1909.

That as soon as possible after the receipt of said decision steps were taken to perfect an appeal on behalf of Rice in this case.

18 That between the time of the receipt of said decision and the date fixed for the expiration of the limit of appeal namely—November 30, 1909, deponent was called to Hamilton, Ontario, to attend the taking of testimony and was also called to Albany, N. Y., for consultation in respect of other matters; that all possible diligence was exercised in preparing the appeal papers and that it was the intention of the party Rice and his attorney, the deponent, to perfect this appeal during the time allowed.

That deponent had always understood that a fee was necessary for an appeal from the Examiner of Interferences to the Board of Examiners-in-Chief in an interference case, but that during the last four years at least deponent has had no occasion to perfect such an appeal. In preparing the appeal papers in the above entitled case deponent was about to give directions that a check for the appeal fee be drawn to form a part of the appeal papers, but before doing so examined the Rules of Practice in the United States Patent

Office—"Revised July 17, 1907, Second Reprint November 21, 1908, with supplement"—to determine whether or not such a fee was now required and the amount of the fee; he examined the schedule of fees on pages 121-122 of said book of rules and found no requirement for such a fee and he also examined the rules covering appeals, contained on pages 41-44, inclusive, of said book of rules and found therein no rule specifying a fee for an appeal from the Examiner of Interferences to the Examiners-in-Chief in an interference proceeding; without comparing the November 1908 reprint with the former rules deponent concluded that an appeal fee had been dis-
19 pensed with.

That on the date on which the papers were forwarded to the Patent Office the book of rules was again examined to determine whether or not requirement for such an appeal fee was contained therein and had been overlooked at the previous examination, but no such requirement was found.

Acting on the supposition that in the latest reprint the rules had been changed, an appeal fee was not made a part of the appeal papers filed.

The schedule of fees provides for fees in special cases and by implication seems to except appeals in interference cases from the Examiner of Interferences to the Board of Examiners-in-Chief. Rule 146 appears to be the only rule covering the question of appeals in interference cases and in this rule nothing is said either directly or by implication with regard to appeal fees.

That immediately upon receipt of the decision of the Honorable Examiner of Interferences, awarding priority of invention to Allen, it was agreed between the party Rice and his attorney, the deponent, that the case should be appealed and in filing the appeal papers the deponent believed that he was complying with all the rules covering the case and it was solely through inadvertence, accident and mistake that the appeal was incomplete in that an appeal fee did not accompany the other appeal papers.

That on December 2, 1909, deponent received a letter from his correspondents in Washington, H. C. Evert & Company, through Theodore K. Bryant, informing him that attention had been
20 called by the Patent Office officials to the fact that the appeal papers in this case had not been perfected because they lacked an appeal fee; that deponent immediately telegraphed said correspondents as follows:

"HARTFORD, CONN., *Dec.* 3, 1909.

Messrs. H. C. Evert & Co., 308 Ouray Building, Washington, D. C.:

Pay appeal fee interference Allen against Rice and prepare necessary papers to insure reinstatement of appeal. Am writing.

H. E. HART."

that since receiving this information from said correspondents the greatest diligence has been exercised in preparing a motion to have the appeal reinstated as of November 30, 1909, or to have the limit

of appeal extended to December 3, 1909, in accordance with the motion attached hereto.

H. E. HART.

Sworn to and subscribed before me this 6th day of December, 1909.

D. I. KREIMENDAHL,
Notary Public.

[NOTARIAL SEAL.]

Letter } No. 25458.
Parcel }

P. O., HARTFORD, CONN.

Received for registration Dec. 6, 1909, *190–*, from Harrie E. Hart addressed to

Southgate & Southgate,
Worcester, Mass.

POSTMASTER,
Per N.

1 class postage prepaid.

21 In re Interference No. 28,971.

HARDING ALLEN
vs.
CHARLES DE LOS RICE.

STATE OF CONNECTICUT,
County of Hartford, ss:

I, D. I. Kreimendahl, being duly sworn, depose and say that on the 6th day of December, 1909, I mailed to Messrs. Southgate & Southgate, counsel for Harding Allen, 339 Main Street, Worcester, Mass., a copy of motion of Charles De Los Rice hereto attached, by registered mail and received the registry receipt of the Hartford Post Office, which is attached hereto.

D. I. KREIMENDAHL.

Sworn to and subscribed before me this 6th day of December, 1909,

LENA E. BERKOVITCH,
Notary Public.

[NOTARIAL SEAL.]

22 Intf. No. 28,971. Paper No. 43.

Address only the Commissioner of Patents, Washington, D. C.,

O.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *December* 7, 1909.

SIR: The case of { Rice / v. / Allen } Motion by Rice for extension of limit of appeal, &c.,

{ [Serial]* / Intf. } No. 28,971, will be heard by the { Commissioner / [Examiners-in-Chief]* }

on the 9th day of December, 1909.

[It is the — case on the assignment for that day.]*

The hearings will commence at [(ten) one]* o'clock, and as soon as the argument in one case is concluded the succeeding case will be taken up.

If any party, or his attorney, shall not appear when the case is called, his right to an oral hearing will be regarded as waived.

The time allowed for arguments is as follows:

Ex parte cases, thirty minutes;

Motions, thirty minutes, each side;

Interference appeals, final hearing, one hour each side.

By special leave, obtained before the argument is commenced, the time may be extended.

The appellant shall have the right to open and conclude in interference cases, and in such case a full and fair opening must be made.

Briefs in interference appeals must be filed in accordance with the provisions of Rule 147.

Respectfully,

E. B. MOORE,
Commissioner of Patents.

To all parties.

To ——.

[* Words and figures enclosed in brackets erased in copy.]

23 December 9, 1909. S. E. T.

Recorded, Vol. 96, Page 38.

Intf. No. 28,971, Paper No. 44.

In the United States Patent Office.

Patent Interference No. 28,971.

RICE
v.
ALLEN.

Belt Gearing.

Motion.

Application of Charles D. Rice, filed March 2, 1906, No. 303,907. Application of Harding Allen, filed September 22, 1905, No. 279,641.

Mr. Harrie E. Hart and Messrs. H. C. Evert & Company for Rice.
Messrs. Southgate & Southgate for Allen.

This is a motion by Rice for an extension of the limit of appeal from the decision of the examiner of interferences from November 30 to December 3, 1909.

It appears from the record that the examiner of interferences in rendering his decision on priority of invention set the limit of appeal to expire November 30, 1909. The moving party filed his reasons for appeal on that date, but they were not accompanied by the appeal fee of ten dollars required by the statute. In
24 order to perfect an appeal to a tribunal in the Patent Office both the reasons for the appeal and the appeal fee must be filed within the time limit set for appeal.

Counsel states in his affidavit accompanying the motion that he had always understood that a fee was necessary for an appeal from the examiner of interferences to the board of examiners-in-chief in an interference case, yet he carefully examined the rules of practice before filing the appeal to determine whether or not such a fee was now required and the amount of the fee. As a result of this examination he concluded that an appeal fee had been dispensed with and therefore did not make it a part of the appeal papers filed.

In view of the statement of counsel, it cannot be held that the failure to file the appeal fee was due either to inadvertence or accident. Counsel admits that he studied the question and determined that no appeal fee was required. Rule 133 provides that an appeal may be taken in *ex parte* cases from the decision of the primary examiner to the examiners-in-chief upon the payment of a fee of ten dollars. Rule 146 is in part as follows:

"In interference cases parties have the same remedy by appeal to the examiners-in-chief * * * as in *ex parte* cases."

A reference is made in the margin to section 4909 of the Revised Statutes, upon which this rule is based. This statute is very clear in its provision for the payment of appeal fees in both *ex parte* and interference cases.

A party to an interference who has been adjudged to be the prior inventor has rights which must be considered. The party
25 who is adjudged not to be the prior inventor is by statute given the right to appeal from the decision, but he must do so within the time set unless circumstances of a compelling nature prevent, otherwise the last decision rendered must stand as the final determination of the case. To this effect is the decision of the Court of Appeals of the District of Columbia in the case of Burton v. Bentley, 87 O. G., 2326, 14 App. D. C., 471.

In view of all the circumstances in this case, I do not find any equity in the motion filed, and the same is therefore denied.

C. C. BILLINGS,
First Assistant Commissioner.

December 10, 1909.

E. E. G.

Intf. No. 28,971, Paper No. 45.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *December* 11, 1909.

In the Matter of the Interference of RICE v. ALLEN.

Intf. No. 28,971.

Motion by Rice.

SIR: You are hereby informed that the above motion has been denied by the First Assistant Commissioner. Please find
26 enclosed herewith a copy of the decision.

By direction of the Commissioner:

Very respectfully,

W. F. WOOLARD,
Chief Clerk.

F.

Charles De Los Rice, c/o Harrie E. Hart, 902 Main St., Hartford, Conn.

Harding Allen, c/o Southgate & Southgate, 339 Main St., Worcester, Mass.

27 PLAINTIFF'S EXHIBIT No. 3—"C."

Filed January 24, 1910.

United States of America
Department of the Interior,
United States Patent Office.

To all to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this Office of Paper Number 46, Motion by Rice, filed December 20, 1909, Paper Number 47, Notice of Hearing, dated December 20, 1909, Paper Number 49, Decision of Commissioner, dated January 3, 1910, and Paper Number 50, Notice of Decision, dated January 3, 1910, in the matter of Interference Number 28,971, Rice vs. Allen, Subject-Matter: Belt Gearing.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 20th day of January, in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States of America the one hundred and thirty-fourth.

[SEAL.] F. A. TENNANT,
Assistant Commissioner of Patents.

28 Mail Room,
Dec. 20, 1909,
U. S. Patent Office.

Docket Clerk,
Dec. 20, 1909,
U. S. Patent Office.

Intf. No. 28,971, Paper No. 46.

In the United States Patent Office.

Before the Honorable Commissioner of Patents.

Interference No. 28,971.

CHARLES DE LOS RICE
vs.
HARDING ALLEN.

Notice.

To Messrs. Southgate & Southgate, Attorney- for Allen, 339 Main St., Worcester, Mass.

GENTLEMEN: Please take notice that on Thursday, the 23rd day of December, 1909, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the annexed motion will be presented before the Honorable Commissioner of Patents in person on behalf of Charles De Los Rice.

H. E. HART,
Attorney for Rice.

Hartford, Conn., December 17, 1909.

29 In the United States Patent Office.

Before the Honorable Commissioner of Patents.

In Interference No. 28,971.

CHARLES DE LOS RICE
vs.
HARDING ALLEN.

Motion.

Hon. Commissioner of Patents.

SIR: Now comes Charles De Los Rice, a party in the above entitled proceeding, and makes the following motions before you in person.

(*a*) That the default in perfecting the appeal herein on behalf of Rice be reopened and that the appeal fee filed December 3, 1909, be entered nunc-pro-tunc as of November 30, 1909, upon which latter date a Notice of Appeal was duly filed within the limit of appeal and such other and further relief as may be just and equitable. The annexed affidavit and the file records will be relied upon in support of this motion.

CHARLES DE LOS RICE,
By H. E. HART
His Attorney.

Hartford, Conn., December 17th, 1909.

30 In the United States Patent Office.

Before the Honorable Commissioner of Patents.

Interference No. 28,971.

CHARLES DE LOS RICE
vs.
HARDING ALLEN.

STATE OF CONNECTICUT,
County of Hartford, ss:

Affidavit.

I, H. E. Hart, being duly sworn, depose and say—

I am counsel for Rice in the matter of the above entitled interference and also in a companion interference entitled Allen v. Rice, No. 28,720.

These two interferences relate in general to the same invention, namely: belt gearing; the issues of interference No. 28,720 refer in

broad terms to the belt gearing itself; those of the present interference No. 28,971 refer to a single structure as forming a part of the complete belt gearing; these two interference cases are cosely related and have been prosecuted together in the taking of testimony and in the arguments. The two cases were argued before the Honorable Examiner of Interferences on the 8th day of September, 1909, and on or about the 10th day of November, 1909, the Honorable Examiner of Interferences rendered decisions in both cases, in No. 28,720 awarding priority of invention to
31 Rice and in the present case No. 28,971 awarding priority of invention to Allen. Said decisions were received by me on or about November 12th, 1909.

I immediately after the receipt of said decisions *I* carefully examined them and the records in both cases; that on Monday, November 15th, pursuant to an agreement made earlier in the month, it was necessary for me to attend the taking of testimony in Hamilton, Ontario, in conenction with litigation pending in the United States Circuit Court for the Eastern District of Pennsylvania; and I did not return to my office until Thursday, the 18th; I also spent a day in Albany in conference on other matters. On Thursday, the 18th of November, an outline and first draft of the appeal in the above entitled case was prepared by me and at my direction; on Monday and Tuesday, November 22nd and 23rd, of the week following, the greater part of my time was demanded in connection with a petition for rehearing in a case decided by the United States Circuit Court of Appeals for the Seventh Circuit; that Wednesday, the 24th, was occupied in the consideration of other matters of importance; Thursday, the 25th, Thanksgiving Day, was a legal holiday; Friday, the 26th, I was necessarily absent from my office for the day; Saturday, the 27th, the appeal was prepared and rewritten in final form and this appeal was mailed from my office on Monday morning, November 29th.

The delay in filing the appeal on the 29th was not due to a desire to postpone the filing until the last minute of the time allowed, but was due to the force of circumstances. All possible diligence was exercised in preparing the appeal papers and it was al-
32 ways the intention of the party Rice and his attorney, the deponent, to perfect this appeal during the time allowed.

After having dictated the outline of the proposed appeal on November 18th and giving the instructions as to the preparation of the necessary papers I examined the Rules of Practice of the United States Patent Office, "Revised July 17, 1907, Second Reprint Nov. 21, 1908, with supplement," turning first to page 121, Rule 203: "The following is a schedule of fees and the prices of publications of the Patent Office;" which reads in part as follows: "On an appeal for the first time from the *Primary Examiner* to the Examiners-in-Chief—$10.00; on *every* appeal from the Examiners-in-Chief to the Commisioner—$20.00."

I then turned to page 41 under Section "Appeals" and Rule 133, which provides for appeals in ex parte cases from the Primary Examiner to the Examiners-in-Chief—"upon payment of a fee of

$10.00"; then to Rule 140, page 43—"From the adverse decision of the Board of Examiners-in-Chief appeal may be taken to the Commissioner in person upon payment of the fee of $20.00 required by the law"; then to Rule 146—"In interference case parties have the same *remedy* by appeal to the Examiners-in-Chief to the Commissioner and to the Court of Appeals of the District of Columbia as in exparte cases"; then to Rule 147—"Appeals in Interference cases must be accompanied by brief statement of the reasons therefore. Etc."

Rule 146, referring in the margin to Revised Statutes, Sections 4904-4909-4910-4911, these statutes were examined as follows:

33 4904. The Commissioner "shall direct the Primary Examiner to proceed to determine the question of prority of invention. And the Commissioner may issue a patent to a party who is adjudged the prior inventor unless the adverse party appeals from the decision of the Primary Examiner or the Board of Examiners-in-Chief, as the case may be, etc."

4909. Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected and every party to an interference may appeal from the decision of the Primary Examiner or the Examiner in charge of interferences in such case to the Board of Examiners-in-Chief; having once paid the fee for such appeal.

4910. If such party is dissatisfied with the decision of the Examiners-in-Chief he may on payment of the fee prescribed appeal to the Commissioner in person.

4911. Refers to appeals to the Court of Appeals of D. C.

The Revised Statutes, Section 4934—"Fees in obtaining patents, etc."—provides for the following fees, among others: "On an appeal for the first time from the Primary Examiner to the Examiners-in-Chief—$10.00; on every appeal from the Examiners-in-Chief to the Commissioner—$20.00."

The examination of Section 4934 of the Revised Statutes disclosing that appeal fees in two specified cases are provided for by law and that no appeal fee from the Examiner of Interferences to the Board of Examiners-in-Chief is provided for or established by law, and finding on comparison of said statute with Rule

34 203 of the Rules of Practice that the fees for appeals established by said rule are the same as those established by the statutes, deponent determined that so far as said Section 4934 and said Rule 203 were concerned there was no requirement for an appeal fee in an interference case from the Examiner of Interferences to the Board of Examiners-in-Chief.

Examination of Section 4909 of the Revised Statutes indicates that said section provides for appeals in three distinct classes of cases and closes with the expression—"having once paid the fee for such appeal." No appeal fee being fixed and it not appearing that necessarily there was an appeal fee in each and every of the cases provided for in this section deponent was again guided by Rule 203 to determine what the "fee for such appeal" was in the case of

an appeal from the Examiner of Interferences to the Board of Examiners-in-Chief, and in said rule and in the corresponding section of the Revised Statutes—4934—found no provision for a fee for such an appeal.

A further examination of Rule 146 of the Rules of practice indicated that it provided that parties in interference cases have "the same *remedy* by appeal" as in ex parte cases, and on the point as to the form of such an appeal or the necessary parts of such an appeal, particularly as respect the appeal fee, the rule was found to be entirely silent.

No other section of the Rules of Practice being found which would throw any light on the question as to whether or not an appeal fee was required in such case deponent referred again to Rule
35 203 and Section 4934 of the Revised Statutes, and by the substance and form of said rule and said statute determined that so far as the laws relating to the subject were concerned and so far as the Rules of Practice were concerned no appeal fee was required on an appeal in an interpartes case from the Examiner of Interferences to the Board of Examiners-in-Chief, and accordingly filed the appeal in the present case in what appeared to be its perfected and complete form, so far as the statutes or the Rules or Practice throw any light on the subject.

That at least since 1902 I have not had occasion to and have not appealed from any decision of the Examiner of Interferences to the Board of Examiners-in-Chief in an interference case and to the best of my present recollection I have never, since I have been engaged in practice before the United States Patent Office, had occasion to take such an appeal, and in preparing the papers in the present appeal I consulted the statutes and the Rules of Practice to determine what the proper practice was in such cases.

Placing complete reliance upon the statutes and the Rules of Practice as a guide in preparing the appeal in this case, believing that said statutes and rules contained specifications for all requirements for a properly perfected appeal, noting that in said rules a clear distinction is maintained between a "Primary Examiner" and the "Examiner of Interferences" (see rules 97, 100, 101) I was led into filing *t*hat I conceived to be a complete and perfected appeal in accordance with the statutes and the rules, although as a
36 matter of fact it appears that the appeal as filed was not in accordance with the requirements of some unwritten or unpublished rule of the Patent Office.

This was not a mistake of law, as the statutes nowhere specifically provide for an appeal fee from the Examiner of Interferences to the Board of Examiners-in-Chief, and for the further reason that in the only section of the Revised Statutes which by most liberal construction could be interpreted as requiring such a fee (Section 4909) no amount as the fee is specified. Such mistake as was made in the perfecting and filing of this appeal is due to the fact that there is some unwritten or unpublished rule of the Patent Office concerning which no suggestion is to be found in the Statutes or the Rules of

Practice as revised July 17, 1907, Second Reprint Nov. 21, 1908, with supplement.

I had always had an indefinite idea that a fee was necessary for an appeal from the Examiner of Interferences to the Board but after having examined the Statutes and rules I determined either that I was wrong or that the requirement for such a fee had been waived in the revised rules which are now in force.

On December 3, 1909, I received a letter from my correspondents in Washington, H. C. Evert & Company, written by them December 2nd, 1909, informing that their attention had been called by a Patent Office official to the fact that the appeal papers in this case had been filed but no fee sent and therefore that the appeal had not been perfected within the time limit. I immediately telegraphed said correspondents as follows:

37 "HARTFORD, CONN., *Dec.* 3, 1909.

Messrs. H. C. Evert & Co., 308 Ouray Building, Washington, D. C.:

Pay appeal fee interference Allen against Rice and prepare necessary papers to insure reinstatement of appeal. Am writing.

H. E. HART."

Said appeal fee was paid by my correspondents on December 3, 1909, the third day after the limit of appeal expired and the same day that I was advised that the appeal papers were not in proper form. The greatest diligence has been exercised in attempting to conform to the requirements of the Office as now known.

The allowance of this motion will work no hardship or injustice to the party Allen in any way whatsoever. No postponement or extension of time for the final argument is requested. Refusal to the party Rice of the right to perfect this appeal will work great hardship and injustice to the party Rice.

I further depose and say on information and belief that on December 2, 1909, the attention of Theodore K. Bryant, an employee of H. C. Evert & Company, 308 Ouray Building, Washington, D. C., was called to certain facts by an official of the Patent Office, which facts consisted of a receipt by the Mailing Division of the Patent Office of a notice of appeal from deponent as attorney for Rice; that said Bryant inspected said notice of appeal and was informed that no appeal fee had been received and that the appeal was therefore not perfected; that said Bryant immediately communicated with deponent and on December 3rd received a telegram
38 requesting that the appeal fee be paid immediately on behalf of Rice and the necessary papers to reinstate the appeal be prepared; and that pursuant to said instructions said appeal fee amounting to $10.00 was duly deposited with the Financial Clerk on said 3rd day of December, 1909; that it was a late hour in the afternoon of December 2nd when the error in omitting to file an appeal fee was called to said Bryant's attention.

H. E. HART.

Sworn to and subscribed before me this 17th day of December, 1909.

D. I. KREIMENDAHL,
Notary Public.

[NOTARIAL SEAL.]

Letter
Parcel
No. 28446.

P. O., HARTFORD, CONN.

Received for registration Dec. 17, 1909, *190,* from H. E. Hart addressed to Southgate & Southgate.
Worcester, Mass.

Postmaster, per —— ——.

1 class postage prepaid.

39 In re Interference No. 28,971.

CHARLES DE LOS RICE
vs.
HARDING ALLEN.

I, D. I. Kreimendahl, being duly sworn, depose and say that on the 17th day of December, 1909, I mailed to Messrs. Southgate & Southgate, counsel for Harding Allen, 339 Main Street, Worcester, Mass., a copy of Motion on behalf of Charles De Los Rice as per the attached, by registered mail and received the registry receipt of the Hartford Post Office, which is attached hereto.

D. I. KREIMENDAHL.

Sworn to and subscribed before me this 18th day of December, 1909.

LENA E. BERKOVITCH,
Notary Public.

[NOTARIAL SEAL.]

40 Address only the Commissioner of Patents, Washington,

Intf. No. 28,971, Paper No. 47.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *Dec.* 20, 1909.

O.

SIR: The case of Rice v. Allen } Motion by Rice

[Serial]* Intf. } No. 28,971, will be heard by the { Commissioner [Examiners-in-Chief]*

on the 23d day of December, 1909.

[It is the — case on the assignment for that day.]*

The hearings will commence at (ten) (one) o'clock, and as soon as the argument in one case is concluded the succeeding case will be taken up.

[* Words and figures enclosed in brackets erased in copy.]

If any party, or his attorney, shall not appear when the case is called, his right to an oral hearing will be regarded as waived.

The time for arguments is as follows:

Ex parte cases, thirty minutes;

Motions, thirty minutes, each side;

Interference appeals, final hearing, one hour each side.

By special leave, obtained before the argument is commenced, the time may be extended.

The appellant shall have the right to open and conclude in interference cases, and in such case a full and fair opening must be made.

Briefs in interference appeals must be filed in accordance with the provisions of Rule 147.

Respectfully,

E. B. MOORE,
Commissioner of Patents.

To All parties
To —— ——.

41 December 23, 1909. S. E. T.

Recorded, Vol. 96, Page 150.

Intf. No. 28,971, Paper No. 49.

In the United States Patent Office.

Patent Interference No. 28,971.

RICE
v.
ALLEN.

Motion.

Belt Gearing.

Application of Charles D. Rice filed March 2, 1906, No. 303,907.
Application of Harding Allen filed September 22, 1905, No. 279,641.

Mr. Harrie E. Hart and Messrs. H. C. Evert & Company for Rice.
Messrs. Southgate & Southgate for Allen.

This is a renewal of a motion by Rice asking for consideration of his appeal to the examiners-in-chief which he attempted to perfect by filing the required fee three days after limit of appeal had expired. The original motion seeking the same relief was denied in a decision rendered December 10, 1909.

42 The excuse offered for failure to file the fee within the time set is briefly that the attorney concluded after thorough consideration of the statutes and rules, that no fee was required on an appeal from the examiner of interferences to the ex-

aminers-in-chief. The renewal motion is found to present no new reasons why the appeal should be reinstated. It is believed that the rules make clear the necessity for an appeal fee, and its amount, in such a case as the present, and the statutes are even more specific. In the language of the statutes the examiner in charge of interferences is termed a "primary examiner" (Sec. 4904), and Sec. 4934, providing for fees, includes the following:

"On an appeal for the first time from the primary examiners to the examiners-in-chief, ten dollars."

These sections, especially in view of Sec. 4909 which provides that—

"* * * every party to an interference, may appeal from The decision * * * of the examiner in charge of interferences in such case, to the board of Examiners-in-Chief; having once paid the fee for such appeal,"

would seem to leave no room for doubt in the matter. If, however, the petitioner entertained any doubts, it was incumbent upon him to inform himself as to the fee and to perfect the appeal within the time set. It is not right for him to render uncertain the position of the other party to the proceeding by delay which could be avoided. As was stated in the case of Blackman v. Alexander, 105 O. G., 2509:

"It may be said here that the limit of appeal fixed by the Office will not ordinarily be extended to include an appeal filed too late. It is only under very unusual and exceptional circumstances that such an extension will be granted. (Briggs v. Conley, C. D., 1903,
158; 104 O. G., 1119.) The right of appeal does not stand
43 upon the same footing as the right to a hearing and decision in the first instance. After a party has obtained a full and careful decision by one tribunal upon the merits of his case he must ordinarily comply strictly with the rules in order to have that decision reviewed by an appellate tribunal."

The circumstances of this case are not believed to warrant making it an exception to the rule.

The petition is denied.

E. B. MOORE,
Commissioner.

January 3, 1910.

Intf. No. 28,971, Paper No. 50.

E. E. G.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *January* 3, 1910.

Motion by Rice.

In the Matter of the Interference of RICE v. ALLEN, Intf. No. 28,971.

SIR: You are hereby informed that the above motion has been

denied by the Commissioner. Please find enclosed herewith a copy of the decision.

By direction of the Commissioner:

Very respectfully,

W. F. WOOLARD,
Chief Clerk.

F.

Charles De Los Rice, c/o Harrie E. Hart, 902 Main St., Hartford, Conn.

Harding Allen, c/o Southgate & Southgate, 339 Main St., Worcester, Mass.

44 *Answer.*

Filed January 28, 1910.

* * * * * * *

To the Honorable the Justices of the Supreme Court of the District of Columbia:

The respondent, Edward B. Moore, Commissioner of Patents, for answer, paragraph for paragraph, to the order to show cause why writs of mandamus and certiorari should not issue, says:

1 to 5, inclusive. Respondent admits the truth of the allegations of paragraphs 1 to 5, inclusive, of the petition of relator.

6. Respondent admits that paragraph 6 of the petition states portions of the Revised Statutes of the United States and of the Rules of Practice of the United States Patent Office relating to appeals and appeal fees.

7. Respondent denies the allegations of paragraph 7 in the manner and form alleged and states that the truth of the matter is as follows:

On November 30, 1909, a notice of appeal from petitioner was received by mail in the United States Patent Office, but that said notice of appeal was not accompanied by the appeal fee required by the statutes and rules and was therefore not a statutory appeal.

Furthermore, that the fee to perfect the appeal was not filed
45 until December 3, 1909, which was outside the limit of appeal (November 30, 1909) fixed in the case.

8. Respondent admits on information and belief the truth of the allegations set forth in paragraph 8 of the petition, with the exception of the concluding statement, namely, "which action was contrary to the United States statutes relating to appeals as set forth above." Respondent denies that said action was contrary to the United States statutes.

9. Respondent admits the truth of the allegations of paragraph 9 of the petition, except the statement that the motions referred to were filed on December 4, 1909, and December 17, 1909, respectively. Respondent states that said motions were dated as of the dates specified, but were not filed in the Patent Office until December 7, and December 20, 1909, respectively.

10. In answer to the allegations of paragraph 10 of the petition, respondent states that petitioner is entitled under the statutes and the Rules of Practice in the Patent Office to an appeal from the decision of the primary examiner, or the examiner in charge of interferences, to the board of examiners-in-chief, but only upon complying with the requirements of the statutes and Rules of Practice, and that among said requirements are the following, namely, that the notice of appeal shall be accompanied by a fee of ten dollars, and that the appeal shall be perfected within a limit of appeal fixed by the Commissioner.

Respondent further avers in answer to paragraph 10 that section 4934 of the Revised Statutes and Rule 203 of the Rules of
46 Practice of the Patent Office in the portions thereof quoted by relator in paragraph 6 of his petition contain the provision "On an appeal for the first time from the primary examiners to the examiners-in-chief, ten dollars." The term "primary examiners" contained in said provision includes not merely the "principal examiners" who pass upon *ex parte* applications, but also the examiner in charge of interference proceedings, as clearly appears from section 4904 of the Revised Statutes, which provides for interference proceedings and uses the term "primary examiner" in referring to the examiner in charge of said proceedings. Said section reads as follows:

"SEC. 4904. Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe."

Under the provisions contained in the latter portion of this statute, it is the practice of the examiner in charge of interferences under the authority of the Commissioner to fix a twenty-day limit of appeal from his decision in an interference. In the interference referred to by relator in his petition, the decision rendered November 10, 1909, fixed the limit of appeal to expire on November 30, 1909. Respondent further avers that this section of the statutes clearly authorizes the fixing of a twenty-day limit of appeal
47 by the Commissioner, as was done in said interference.

Respondent further avers in answer to paragraph 10 of the petition that section 4909 of the Revised Statutes (quoted by relator in paragraph 6 of his petition) provides for an appeal by a party to an interference to the board of examiners-in-chief only upon "having once paid the fee for such appeal." Respondent further avers that Rule 146 of the Rules of Practice of the Patent Office is as follows:

"146. In interference cases parties have the same remedy by

appeal to the examiners-in-chief, to the Commissioner, and to the court of appeals of the District of Columbia as in ex parte cases."

Also that Rule 133 of the Rules of Practice of the Patent Office, which provides for the appeals in the *ex parte* cases referred to in Rule 146, supra, states that "upon payment of a fee of $10, appeal from the decision of the primary examiner to the examiners-in-chief" may be taken.

11. Respondent denies the allegations of paragraph 11 of the petition and avers that petitioner's appeal was not perfected and filed within the limit of appeal set in the case, and that petitioner was not therefore entitled as a matter of right and as a matter of law to have said appeal allowed and docketed.

12. Respondent denies the allegations of paragraph 12 of the petition.

13. Respondent denies the allegation of paragraph 13 that under the facts and circumstances of this case the denial by the Commissioner of Patents of petitioner's motion to have the appeal fee paid December 3, 1909, accepted as if paid on the 30th of Novem-
48 ber, 1909, was an abuse of discretion. It was such an action as the courts would ordinarily take where a motion was filed under similar circumstances to accept an appeal filed three days outside of the limit of appeal. The affidavits of relator accompanying his motions and forming part of his exhibits show that he was under the impression that an appeal fee was necessary, but allege that he found no provision in the rules or statutes requiring it. It was clearly incumbent upon relator to inform himself positively as to the fee and to perfect the appeal within the time set. Relator's error in the matter of the fee was a mistake in his interpretation of the law for which he is responsible. Relator's opponent in the interference, who has been adjudged to be the prior inventor, has rights which must be considered.

14. Respondent denies that by his acts the petitioner is deprived of legal rights vested in him by the laws of the United States, as alleged in this paragraph, and avers that a writ of mandamus therefore will not lie.

And now, having fully answered the said petition, respondent prays that the rule to show cause issued against him be discharged, and that the respondent be hence dismissed with his reasonable costs.

EDWARD B. MOORE,
Commissioner of Patents.

W. S. RUCKMAN,
Attorney.

49 DISTRICT OF COLUMBIA:

On this day personally appeared before me, a notary public in and for the District of Columbia, Edward B. Moore, and made oath that he is the respondent in the above entitled cause; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the same is true of his knowledge, except as to the mat-

ters there stated to be alleged on information and belief, and that as to those matters he verily believes it to be true.

Sworn to and subscribed before me this 28th day of January, 1910.

[SEAL.] W. BERTRAND ACKER,
Notary Public, D. C.

Motion to Amend Petition.

Filed February 4, 1910.

* * * * * * *

Now comes Charles De Los Rice, petitioner in the above entitled case, by his attorney, and moves this Honorable Court for leave to amend the petition in the following particulars:

Substitute after paragraph 5 the following:

"5A. That between the 10th day of November, 1909, and the 30th day of November, 1909, there were three Sundays and one legal holiday, to wit: November 14th, 21st, 25th and 28th; that Section
4904 of the Statutes provides among other things "unless the
50 adverse party appeals * * * within such time, not less
than twenty days, as the Commissioner shall prescribe"; that your petitioner's appeal was filed in the United States Patent Office on November 30th and appeal fee was paid on December 3rd, all of which was within twenty working days of the decision of the Examiner in Charge of Interferences, namely, November 10th, 1909.

CHARLES DE LOS RICE,
By MILTON STRASBURGER,
His Attorney.

Hartford, Conn., February 2, 1910.

Stipulated Amendment to Answer.

Filed February 9, 1910.

* * * * * * *

Relator having amended his petition by inserting paragraph 5 A, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the proceeding, that the answer of the respondent to the rule to show cause may be amended, by interlineation or otherwise, to answer said paragraph, as follows:

5 A. Respondent admits the allegation of amended paragraph 5 A but avers that neither the statutes or Rules of Practice of the
51 Patent Office specify working days or exclude Sundays and holidays in computing the limit of appeal, that it is the general practice of the courts to include Sundays and holidays in computing time unless they are expressly excluded and that it is the uniform practice of the Patent Office to so include them.

MILTON STRASBURGER,
Attorney for Petitioner.
W. S. RUCKMAN,
Attorney for Respondent.

February 8, 1910.

Demurrer.

Filed February 17, 1910.

* * * * * * *

Comes now the petitioner, and demurs to the answer heretofore filed by the respondent, Moore, to the petition and rule in this cause, upon the ground that the same is insufficient in law.

MILTON STRASBURGER,
Attorney for Petitioner.

NOTE.—One of the grounds to be argued in support of the foregoing demurrer is that there is no warrant in law for the refusal of the Commissioner of Patents to enter and docket appeal of
52 petitioner from decision of Examiner of Interference.

MILTON STRASBURGER,
Attorney.

Amendment to Petition.

Filed February 25, 1910.

* * * * * * *

Comes now the Relator, by his Counsel, and by leave of Court first had and obtained, hereby amends the petition heretofore filed in this cause by striking therefrom paragraph thirteen, and the words "or writ of certiorari" in paragraph fourteen, and the second and third prayers for relief.

CHARLES DE LOS RICE,
By MILTON STRASBURGER,
His Attorney.

I consent to the above amendments:

W. S. RUCKMAN,
Counsel for Respondent.

February 19th, 1910.

(Endorsed.)

Leave is hereby granted to file the within amendment, Feb. 25, 1910.

WRIGHT.

53 Supreme Court of the District of Columbia.

FRIDAY, *March* 25, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon consideration of the petitioner's demurrer to the answer of the respondent to the rule to show cause in this case, it is ordered that said demurrer be, and it hereby is overruled.

Opinion.

I think the sense of R. S. Sections 4904-9-34 required the payment of the fee for appeal in the petitioner's instance. The demurrer is overruled.

WRIGHT.

FRIDAY, *April* 8, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

It appearing to the Court that the petitioner's demurrer to the respondent's answer to the rule to show cause herein was
54 overruled on the 25th day of March 1910, and the petitioner now in open Court says he will stand upon his demurrer, it is ordered that judgment on said demurrer be entered.

Therefore it is considered that the rule to show cause herein be, and the same is hereby discharged, the petition dismissed, and that the respondent recover against the petitioner, the costs of his defense, to be taxed by the Clerk, and have execution thereof.

From the foregoing the petitioner by his Attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and, upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100.)

Directions to Clerk for Preparation of Transcript of Record.

Filed April 19, 1910.

* * * * * * *

The Clerk will please prepare a transcript of record on appeal to the Court of Appeals of the District of Columbia, and include therein the following:

Petition of Charles De Los Rice for Writ of Mandamus, filed January 24th, 1910, as amended.

Plaintiff's exhibits numbers 1, 2 and 3, filed with the petition on the same day.

Answer of respondent to rule to show cause, filed January 23rd, 1910.

55 Demurrer of petitioner, filed February 17th, 1910.

Final judgment entered April 8th, 1910.

Opinion of Court indorsed on back of demurrer.

MILTON STRASBURGER,
Attorney for Appellant.

Memoranda.

April 20, 1910.—Appeal bond approved and filed.
May 31, 1910.—Time to file transcript extended to and including July 15, 1910.

56 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 55, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52322 at Law, wherein United States of America, ex rel. Charles De Los Rice is Plaintiff and Edward B. Moore is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of June A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2186. United States of America ex rel. Charles De Los Rice, appellant, vs. Edward B. Moore. Court of Appeals, District of Columbia. Filed Jun- 28, 1910. Henry W. Hodges, clerk.